Filed 6/5/17 In re A.M. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re A.M., a Person Coming Under the Juvenile Court Law.	B277813
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ALISHA M., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK83148)

APPEAL from an order of the Superior Court of Los Angeles County, John Parker, Judge. Affirmed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Mother, Alisha M., appeals from the order of the juvenile court terminating her parental rights to three-year-old A.M. Mother's sole contention is that the trial court erred in ruling the Indian Child Welfare Act (25 U.S.C. § 1901 et seq., the ICWA) does not apply to A. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Department of Children and Family Services (the Department) detained A. in July 2014 when mother was arrested and jailed on charges of assault with a deadly weapon, vandalism, and battery on a peace officer. The juvenile court placed the child with D.S., who has since become A.'s prospective adoptive parent. The social worker stated in the Department's detention report that ICWA did not apply as mother reported she did not have any Indian heritage.

The Department filed a petition naming A. (Welf. & Inst. Code, § 300, subds. (a), (b) & (j).)[1] Attached to the petition was a declaration, signed under penalty of perjury by the social worker, averring that she had inquired of mother, who denied any Indian ancestry. On July 21, 2014, mother checked off box 3.d. of Judicial Council form ICWA-020, entitled "Parental Notification of Indian Status," indicating that she had no Indian heritage, as far as she knew, and signed her name under penalty of perjury.

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

The court noted that mother's ICWA-020 form suggested no known Indian ancestry.

Mother named two men, Ernest S. and Isaiah J., as potential fathers of A. The juvenile court declared both men to be alleged fathers.[2] The Department conducted an investigation to locate the two alleged fathers and filed reports of its due diligence efforts with the court. Ernest S. was located and signed an ICWA-020 form stating that as far as he knew, he did not have Indian heritage.

The juvenile court sustained the petition and declared A. to be a dependent of the court under section 300, subdivisions (a) and (b).

During the ensuing dependency, the Department repeatedly stated in its reports that ICWA did not apply to this case. The juvenile court terminated reunification and the case progressed toward the hearing under section 366.26 to select and implement a permanent plan.

At the section 366.26 hearing held on June 22, 2016, the juvenile court made a finding that it had no reason to know that ICWA applied to the case and declined to order notice to any tribe or to the Bureau of Indian Affairs (BIA). This finding was based, as to Ernest S., on his ICWA-020 form, signed under penalty of perjury.

Turning to Isaiah J., the juvenile court ruled that the efforts to locate him were adequate and the Department's notice by publication was proper. Mother mentioned that she may have seen Isaiah J. at a restaurant and offered to talk to his sister concerning his whereabouts. The court responded by finding that

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[2] Neither alleged father is a party to this appeal.

it had no reason to know that ICWA applied through Isaiah J.'s family, but agreed to revisit that finding at the continued section 366.26 hearing. The court ordered the parents to keep it, the Department, and counsel aware of new information relating to possible ICWA status.

According to the supplemental report filed in September 2016 to address Isaiah J.'s ancestry, mother told the social worker in August 2016 that she had heard that the man was in jail, and was " 'pretty sure' " the jail was in California. Asked whether she knew if Isaiah J. had Indian heritage, mother replied, " 'I don't know.' . . . '*I do know my daughter has some*.' . . . '*I just know she does, I'm not sure if it's on my side or the paternal side*.' " (Italics added (August 2016 statement).) The report reflects no further inquiry on the social worker's part.

At the contested section 366.26 hearing, held in September 2016, the juvenile court found, citing the Department's supplemental report, that ICWA did not apply. After the court terminated parental rights, mother filed her appeal.

CONTENTION

Mother contends that the juvenile court's finding that ICWA does not apply was reversible error.

DISCUSSION

1. *ICWA*

Congress enacted ICWA to "cure" " 'abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.' [Citation.]" (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1194.) ICWA "is intended to protect Indian children and to promote the

stability and security of Indian tribes and families. [Citations.]" (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1385.)

Notice is key to effectuating ICWA's goals. (*In re Michael V.* (2016) 3 Cal.App.5th 225, 232 (*Michael V.*).) The tribes, not the courts, determine the Indian status of dependent children. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) Notice to the tribe of the pending proceeding enables the tribe to make that determination, and to exercise jurisdiction over, or to intervene in, the matter. (See *Michael V.*, *supra,* at p. 232.)

Notice to the tribe is required under federal ICWA law "where the court *knows or has reason to know* that an Indian child is involved" in an involuntary state court proceeding seeking the foster care placement of, or termination of parental rights to, an Indian child. (25 U.S.C. § 1912(a), italics added.) Likewise, California law requires notice in accordance with section 224.2, subdivision (a), to the Indian child's tribe "If the court, social worker, or probation officer *knows or has reason to know* that an Indian child is involved . . . ." (§ 224.3, subd. (d), italics added; Cal. Rules of Court, rule 5.481(b).) ICWA notice must be given to the BIA if the identity of the tribe cannot be determined. (25 U.S.C. §§ 1903(11), 1912(a) & § 224.2, subd. (a)(4).)

"[R]eason to know . . . ." was not defined in ICWA or the implementing federal regulations at the time this case was pending. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 650.)[3] A

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[3] New regulations, effective as of December 2016 catalog circumstances in which a court has " 'reason to know' the child is an Indian child," and include if " '[a]ny participant in the proceeding . . . informs the court that it has discovered *information indicating that the child is an Indian child*.'

minimal showing will trigger the statutory notice provisions. (*In re D.C.* (2015) 243 Cal.App.4th 41, 63.) In California, the "circumstances that may provide reason to know the child is an Indian child" include, among others, when "[a] person having an interest in the child . . . *provides information suggesting* the child is a member of a tribe or eligible for membership in a tribe . . . ." (§ 224.3, subd. (b)(1); see also *In re Nikki R.*, *supra*, 106 Cal.App.4th at p. 848 [a "suggestion of Indian ancestry" will meet this minimal showing required.)[4] A mere assertion of Indian ancestry alone, however, without other factual information, is not enough "*information* suggesting" tribal membership or eligibility for tribal membership to require ICWA notice. (§ 224.3, subd. (b)(1), italics added; *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1516, citing *In re O.K.* (2003) 106 Cal.App.4th 152, 157.) That is, the claim that a child " 'may' " have Indian ancestry is not sufficient to trigger ICWA notice when the claim is unaccompanied by other information reasonably suggesting the child had Indian heritage. (*In re Jeremiah G.*, *supra*, at p. 1516.)

Section 224.3, subdivision (a) places " 'an affirmative and continuing duty' " to inquire whether a child " 'is or may be' " an

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(25 C.F.R. § 23.107(c)(2) (2017).)" The new regulations apply to any child custody proceeding initiated on or after December 12, 2016, regardless of whether the child was involved in dependency proceedings before that date. (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 650, fn. 7.)

[4] Where California provides a lower threshold for triggering notice than that found in the federal law, we must apply California law to give a higher level of protection to the Indian tribes. (*In re Alice M.*, *supra*, 161 Cal.App.4th at p. 1199.)

Indian child "in all dependency proceedings, including a proceeding to terminate parental rights." (*In re Isaiah W.* (2016) 1 Cal.5th 1, 9, 10; *In re M.R.* (2017) 7 Cal.App.5th 886, 904.) "[E]nsuring strict compliance with federal ICWA notice requirements is necessary because a violation renders the dependency proceedings, including an adoption following termination of parental rights, vulnerable to collateral attack if the dependent child is, in fact, an Indian child." (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 653.)

The juvenile court's ICWA findings are reviewed for substantial evidence. (See *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467.)

2. *The evidence supports the juvenile court's finding ICWA did not apply to A.*

The ancestry of alleged fathers Ernest S. and Isaiah J. is not at issue. "The ICWA expressly excludes from the definition of 'parent' an 'unwed father where paternity has not been acknowledged or established.' [Citation.]" (*In re Daniel M.* (2003) 110 Cal.App.4th 703, 708.) The sole question here is mother's heritage.

The Department fulfilled its obligation to inquire at each proceeding whether A. is an Indian child. (Cal. Rules of Court, rule 5.481(a).) The social worker asked mother when the Department detained A. (*id.*, (a)(1)), at mother's first appearance (*id.*, (a)(2)), when the Department filed the petition (*id.*, (a)(1)), and thereafter. Mother completed ICWA-020 form stating that she did not have Indian ancestry. (*Id.*, (a)(2).) The answer was always in the negative. The juvenile court also ordered the

parties to notify it of any new information they might gather. (25 C.F.R. § 23.107(a).)[5]

However, the September 2016 order terminating mother's parental rights is "necessarily premised on a *current* finding by the juvenile court that it had no reason to know" A. was an Indian child and hence that ICWA notice was not required. (*In re Isaiah W.*, *supra*, 1 Cal.5th at p. 10.) Mother contends the juvenile court's finding at the September 2016 section 366.26 hearing that ICWA did not apply was error because her August 2016 statement gave the court reason to know that A. was an Indian child, notwithstanding her previous declarations to the contrary. We disagree.

Mother immediately undermined her August 2016 claim "I just know" A. has Indian ancestry, by stating that she did not know where A.'s ancestry came from: either her family or the father's family. Her statement contained no actual *information* reasonably suggesting that A. had any known Indian ancestry from her family, such as the source of the heritage or the likely tribe, let alone facts suggesting eligibility for membership. (*In re Jeremiah G.*, *supra*, 172 Cal.App.4th at p. 1516.) Mother's suggestion that the Indian heritage came from A.'s father's side is meaningless because mother did not even know who A.'s father was, and because as a matter of law, neither alleged father's heritage here was relevant. The juvenile court's finding it had no reason to know A. was an Indian child was supported by the record.

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[5] Title 25 Code of Federal Regulations states in relevant part: "State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child." (25 C.F.R. § 23.107(a).)

Mother nonetheless argues, even if the August 2016 statement did not give the Department "reason to know," it triggered a duty of further inquiry, for example, of the maternal relatives.

The duty of further inquiry is triggered by a lower standard of certainty about the child's Indian heritage than is the obligation to send formal notice to tribes or the BIA. (*In re Alice M.*, *supra*, 161 Cal.App.4th at p. 1200; *In re Michael V.*, *supra*, 3 Cal.App.5th at p. 235.) As explained, section 224.3 imposes on the juvenile court and the Department the "affirmative and continuing duty to inquire" whether a child in all dependency proceedings "*is or may be* an Indian child . . . ." (§ 224.3, subd. (a), italics added.) The Rules of Court direct that if the social worker or Department "knows or has reason to know that an Indian child *is or may be* involved, that person or entity must make further inquiry as soon as practicable by: [¶] (A) [i]nterviewing the parents . . . and 'extended family members' . . . ." (Cal. Rules of Court, rule 5.481(a)(4)(A), italics added.)

Even under this lower standard, however, mother's August 2016 statement did not spark the duty to make further inquiry pursuant to section 224.3, subdivision (a). (*In re Alice M.*, *supra*, 161 Cal.App.4th at p. 1200.) The court in *In re Hunter W.* disagreed that further inquiry of the mother's claim of Indian heritage through her father and deceased paternal grandmother was required where the mother did not identify the tribe or nation, and did not know of any relative who was a member of a tribe. (*In re Hunter W.*, *supra*, 200 Cal.App.4th at p. 1468.) *In re Alice M.* "posit[ed] that there are many instances in which vague or ambiguous information is provided regarding Indian heritage

or association (e.g., 'I think my *grandfather* has some Indian blood'; 'My great-grandmother was *born on an Indian reservation in New Mexico*'). In these types of cases . . . *inquiry* is necessary before any attempt at notice to a specific tribe even can be made." (161 Cal.App.4th at p. 1200, italics added; see also *In re J.L.* (2017) 10 Cal.App.5th 913, 923 [held " ' "family lore" ' " did not trigger duty of further inquiry where mother did not know if she had Indian heritage and did not know names of relatives with such ancestry].) Here, mother's August 2016 statement provided even less information than the statements made in *In re Hunter W.* or posited by *In re Alice M.* Mother could not identify the relative through whom she or A.'s father had Indian ancestry, named no tribe or nation, and made no suggestion that any relative of A.'s was born, or lived, on a reservation. Mother's sudden, speculative, insubstantial claim -- unsupported by any information indicating a reason for her statement beyond basic biology -- gave the juvenile court no reason to believe A. *may* be an Indian child to trigger the duty of further inquiry under section 224.3, subdivision (a).[6] There was no juvenile court error under ICWA.[7]

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[6] The cases mother relies on are distinguished because in each of them, the Department had some palpable information suggesting an Indian child was involved that triggered either the notice requirement or the lesser duty of further inquiry. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 252 [parents claimed they had Cherokee heritage]; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1113, 1115-1116 [father told the social worker that the paternal great-grandmother may have been registered with a Cherokee tribe]; *In re L.S.* (2014) 230 Cal.App.4th 1183, 1197-1198 [agency received information that parents claimed variously Blackfoot, Sioux, and Cherokee

DISPOSITION

The juvenile court's section 366.26 order is affirmed.

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ALDRICH, Acting P. J.

We concur:

LAVIN, J.

JOHNSON (MICHAEL), J.*

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heritage]; *In re B.H.* (2015) 241 Cal.App.4th 603, 605 [agency aware paternal grandfather had Cherokee heritage]; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1405 [father stated he believed his deceased maternal grandparents had Indian ancestry].) The Department never asked the mother in *In re J.N.* (2006) 138 Cal.App.4th 450, 461 whether she had Indian ancestry.

7 Permission to file the motion to take judicial notice submitted by the Department on May 19, 2017 is denied.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.